



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2012-0309]

Agency Information Collection Activities; New Information Collection Request: Driver and Carrier Surveys Related to Electronic On-Board Recorders (EOBRs), and Potential Harassment Deriving from EOBR Use

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for information.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval. The purpose of this new ICR is to broadly examine by the collection of survey data, the issue of driver harassment and determine the extent to which Electric On-Board Recorders (EOBRs) used to document drivers' hours of service could also be used by motor carriers or enforcement personnel to harass drivers and/or monitor driver productivity. The survey will also collect information on the extent to which respondents believe that the use of EOBRs may result in coercion of drivers by motor carriers, shippers, receivers and transportation intermediaries. The proposed surveys for drivers and carriers collect information related to issues of EOBR harassment of drivers by carriers. FMCSA will publish a supplemental notice of proposed rulemaking on EOBRs and will consider survey results concerning the EOBR use by motor carriers including countermeasures or best practices to ensure that EOBRs are not used by carriers to harass or coerce drivers prior to the issuance of a final rule.

DATES: Comments must be received on or before **[Insert date 60 days after the date of publication of this notice in the Federal Register]**

ADDRESSES: You may submit comments identified by Docket Number FMCSA-2012 – 0309 using any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-00001.
- Hand Delivery or Courier. West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001 between 9:00 a.m. and 5:00 p.m. e.t. Monday through Friday, except Holidays.
- Fax 1-202-493-2251

To avoid duplication, please use only one of these four methods. Each submission must include the Agency name and the docket number for this Notice. Note that DOT posts all comments received without change to <http://www.regulations.gov>, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to <http://www.regulations.gov> at any time or to Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The FDMS docket is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or post card or print the acknowledgement page that appears after submitting them on-line.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement for the Federal Docket Management System published in the Federal Register on January 17, 2008 (73 FR 3316), or you may visit <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

FOR FURTHER INFORMATION CONTACT: Albert Alvarez, Research Division, Office of Analysis, Research and Technology, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave., SE, Washington, DC 20590. *Telephone*: (202 385-2387); e-mail albert.alvarez@dot.gov. Requests for additional information or copies of the information collection instrument and instructions should be directed to Gene Bergoffen, Principal, MaineWay Services, PO Box 166, Fryeburg, ME 04037. *Telephone*: 207 935-7948; e-mail bergoffen@roadrunner.com.

SUPPLEMENTARY INFORMATION:

Background

Motor carrier management and oversight of drivers' hours-of-service (HOS) is one of the fundamental concerns of FMCSA. Motor carriers began to look to automated methods of recording drivers' record of duty status (RODS) in the mid-1980s as a way to save drivers time and improve the efficiency of their compliance assurance procedures. In April 1985, the Federal Highway Administration (FHWA), the predecessor agency to FMCSA within the U.S. Department of Transportation (DOT), granted the first of 10 waivers to allow use of on-board computers in lieu of requiring drivers to complete handwritten RODS.

After conducting notice-and-comment on the rulemaking regarding automated methods of recording RODS, the Agency issued a final rule on September 30, 1988. The rule revised part 395 of the Federal Motor Carrier Safety Regulations (FMCSRs) by allowing motor carriers the flexibility to equip commercial motor vehicles (CMVs) with an automatic on-board recording device (AOBRD) in lieu of requiring drivers to complete handwritten RODS. The term “automatic on-board recording device” was defined under § 395.2 as follows:

“an electric, electronic, electromechanical, or mechanical device capable of recording driver's duty status information accurately and automatically as required by §395.15. The device must be integrally synchronized with specific operations of the commercial motor vehicle in which it is installed. At a minimum, the device must record engine use, road speed, miles driven, the date, and time of day.”

On April 5, 2010, FMCSA published a final rule to incorporate new performance standards for electronic on-board recorders (EOBRs) installed in CMVs manufactured on or after June 4, 2012. The new rule also required installation of EOBRs meeting the new performance standards in CMVs operated by motor carriers found by the Agency to have serious HOS noncompliance. EOBRs would have been required to automatically record the CMV's location at each change of duty status and at intervals while the CMV is in motion. Current on-board recorders were not required to do this. To ensure a smooth transition from AOBRDs to EOBRs, the final rule would have required that for CMVs manufactured on or after June 4, 2012, devices installed by a manufacturer or motor carrier would need to have met the requirements of § 395.16. Commercial motor vehicles manufactured prior to June 4, 2012 could be equipped with an HOS recording device that met the requirements of either §395.15 (AOBRD) or § 395.16.

The 2010 EOBR rule was challenged in court based in part on concerns that EOBRs could be used to harass drivers. *Owner-Operators Independent Drivers Association v. U.S. Department of Transportation*, 656 F.3d 580 (7th Cir. 2011). At the time, a new rulemaking by FMCSA had been started that proposed to require certain motor carriers operating CMVs in interstate commerce to use EOBRs to document their drivers' HOS (76 FR 5537, February 1, 2011). Based on issues raised in the litigation on the April 2010 final rule, FMCSA published a notice requesting public comment on the harassment issue on April 13, 2011 (76 FR 20612). The Agency sought and received comments on the following items:

- Experiences drivers have had regarding harassment, including coercion by carriers to evade the HOS regulations;
- Whether such carrier activity would be permitted as productivity monitoring or would be barred by other statutory or regulatory provisions;
- Whether use of EOBRs would impact the ability of carriers, shippers, and other parties to harass or coerce drivers to violate HOS requirements;
- The effectiveness of mechanisms currently available under 49 CFR 392.3, 49 CFR part 395 and 49 U.S.C. 31105(a) to protect against carrier coercion; and
- Whether additional regulations or guidance from FMCSA are necessary to ensure that EOBR devices are not used to harass vehicle operators.

On August 26, 2011, the U.S. Court of Appeals for the Seventh Circuit vacated the Agency's April 2010 final rule on the use of EOBRs. The court stated that contrary to statutory requirements, the Agency failed to address the issue of driver harassment, including how EOBRs could potentially be used to harass drivers and ways to ensure that EOBRs were not used to harass drivers. The court also noted that the Agency had not estimated the safety benefits of

EOBRs currently in use and how much EOBRs increased compliance. The basis for the court's decision was FMCSA's failure to directly address a requirement in 49 U.S.C. § 31137(a). At the time of the court's decision, the statute read as follows:

USE OF MONITORING DEVICES. If the Secretary of Transportation prescribes a regulation about the use of monitoring devices on commercial motor vehicles to increase compliance by operators of the vehicles with hours of service regulations of the Secretary, the regulation shall ensure that the devices are not used to harass vehicle operators. However, the devices may be used to monitor productivity of the operators.

As a result of the court's ruling, carriers relying on electronic devices to monitor HOS compliance are currently governed by the rules that address the use of AOBRDs as in effect immediately before the court's ruling (49 CFR 395.15). These rules were not affected by the court's decision. On May 14, 2012, FMCSA rescinded the April 5, 2010 final rule, as amended September 13, 2010, in response to the court's decision to vacate the rulemaking. FMCSA had previously announced its intent to move forward with a rule on electronic logging devices with a supplemental notice of proposed rulemaking (SNPRM) (77 FR 7562 (February 13, 2012)). Congress subsequently mandated that the Secretary of Transportation adopt regulations requiring that commercial motor vehicles involved in interstate commerce, operated by drivers who are required to keep records of duty status (RODS), be equipped with electronic logging devices. (MAP-21, Pub. L. 112-141, § 32301(b), 126 Stat. 405, 786-788 (July 6, 2012), amending 49 U.S.C. 31137). The legislation retained the requirement that regulations ensure such devices not be used to harass drivers of CMVs. MAP-21 also required that certain regulations governing CMV safety ensure that drivers of CMVs are not coerced into operating in violation of

regulations to be promulgated (Pub. L. 112-141, § 32911. 126 Stat. at 818 (amending 49 U.S.C. 31136(a)).

The objectives of the proposed driver and carrier surveys through this ICR are to broadly examine the issue of driver harassment and coercion and determine the extent to which EOBRs could be used to either harass and/or monitor driver productivity. These surveys will explore the relevant issues from the point of view of both drivers and carriers towards the use of EOBRs. The survey results will inform FMCSA in its ongoing rulemaking on EOBRs, including potential countermeasures or best practices that will ensure that EOBRs are not used to harass or coerce CMV drivers. The purpose of these surveys is, in part, to respond to the court's suggestion that the Agency research the issue of driver harassment based on use of the device.

Title: Driver and Carrier Surveys Related to Electronic On-Board Recorders (EOBRs), and Potential Harassment Deriving from EOBR Use

OMB Control Number: 2126-XXXX.

Type of Request: New ICR.

Respondents: Commercial motor vehicle drivers and carriers.

Estimated Number of Respondents: 1,039 [(2 carrier in-depth interviews + 20 carrier pre test web interviews + 400 carrier main survey web interviews + 100 carrier non-response telephone follow up interviews) + (7 driver in-depth interviews + 510 driver intercept interviews) = 1,039].

Estimated Time per Response: 30 minutes for in-depth interviews of drivers and motor carriers; 20 minutes for carrier survey; 20 minutes for the driver survey; 10 minutes for the telephone interview of carriers with non-responses.

Expiration Date: N/A.

Frequency of Response: Once.

Estimated Total Annual Burden: 110.5 hours [(2 carrier in-depth interviews x 30 minutes/60 minutes + 20 carrier pre-test web interviews x 20 minutes/60 minutes + 400 carrier main survey web interviews x 20 minutes/60 minutes+ 100 carrier non-response telephone follow up interviews x 10 minutes/60 minutes) + (7 driver in-depth interviews x 30 minutes/60 minutes + 510 driver intercept interviews x 20 minutes/60 minutes) /3 year approval) = 110.5].

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: 1) whether the proposed collection is necessary for the FMCSA to perform its functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the information to be collected; and (4) ways that the estimated annual burden could be minimized without reducing the quality of the collected information.

Issued on: December 3, 2012

Kelly Leone
Associate Administrator for Office of
Research and Information Technology

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